



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Dick Corporation
File: B-223924
Date: November 25, 1986

DIGEST

Protest of the contracting agency's decision to allow upward price correction of an allegedly mistaken low bid is sustained where the worksheets, adding machine tape, and subcontractor quotation telephone memorandum submitted to support the mistake claim do not establish the intended bid by clear and convincing evidence; claimant may, however, withdraw its bid since the evidence presented does reasonably support the existence of a mistake.

DECISION

Dick Corporation (Dick) protests the decision of the National Guard Bureau to permit J. Rose Corporation (Rose) to correct a mistake in its low bid under invitation for bids (IFB) No. DAHA30-86-B-0003. The IFB is for the construction of a corrosion control/fuel cell hanger at Stewart International Airport, Newburgh, New York.

We sustain the protest.

The technical specifications of the IFB detailed what the contractor was to do, in descriptions set out by work "divisions." For example, Division 15 concerned "Mechanical" requirements, and included 26 sections for the various components of the mechanical work; Division 16 was labeled "Electrical," and included 25 work sections. In responding to the IFB, however, bidders were to enter only a single, lump sum amount for the entire job.

Six bids were received by bid opening on May 29, 1986. Rose's lump sum bid of \$8,910,000 was low, while Dick's bid of \$10,199,000 was next low. The government estimate was \$9,131,723. The morning after bid opening, Rose called the

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contracting officer advising that it had made a mistake in its bid and that the intended price was \$9,535,000. Rose alleged that it had omitted a \$625,000 subcontractor quote for a fire protection system--fire protection was one of the sections of Division 15. Rose then provided memoranda of subcontractor telephone quotations, adding machine tapes, and its original worksheets, in support of its request for correction of the bid, claiming that the error occurred in a telephone call from Rose's offices to the firm's messenger at the bid opening location advising of the price to bid. The Army determined that Rose had submitted clear and convincing evidence of the mistake, the manner in which it occurred, and the intended bid. Therefore, the Army allowed Rose to correct the bid to \$9,535,000, noting that Rose's corrected bid was still \$664,000 below the next low bid. Dick contends that the circumstances do not warrant correction of Rose's bid.

An agency may permit upward correction of a low bid where clear and convincing evidence establishes both the existence of a mistake and the bid actually intended. Federal Acquisition Regulation (FAR), 48 C.F.R. § 14.406-3(a) (1985). Whether the evidence of the mistake and the bid intended meets the clear and convincing standard is a question of fact, and we will not question an agency's decision based on this evidence unless it lacks a reasonable basis. Fortec Constructors, B-203190.2, Sept. 29, 1981, 81-2 C.P.D. ¶ 264.

The memoranda of subcontractor quotations submitted by Rose include one from Favino Mech. Const. (Favino), dated May 29, 1986, time 1:19 p.m.--bids were opened at 2 p.m. that day--with a price of \$1,170,000 and the notation:

"no fire protection
5 feet outside wall w/piping."

(As stated below, this price was carried over onto Rose's worksheets.) The subcontractor quotation allegedly omitted by Rose was from S&S Fire Suppression (S&S), also dated May 29, but with no time or division of work noted, and reflected a price of \$625,000 with the notation "Inside the bldg only (Price does not include anything outside the building)." Another subcontractor quotation submitted by Rose was from Auto Sprinkler for \$864,000, dated May 29, and included the note "Section 15300 [the fire protection section of Division 15], inside work only."

The adding machine tape submitted to support Rose's claim only shows that no figure of \$625,000 was added into the final bid price. As to the worksheets, as a general matter worksheets may constitute clear and convincing evidence if they are in good order and indicate the intended bid price, and there is no contravening evidence. Montgomery Construction Co., Inc., B-221317, Feb. 28, 1986, 86-1 C.P.D. ¶ 210. Our review of the worksheets submitted by Rose, however, reveals no reference to a fire protection system. The worksheets merely point out, by markings added after the fact, where the omitted item should have been entered under specification Division 15. Under all worksheet divisions except 15 and 16, Rose broke down the cost by section of the specifications. However, under Divisions 15 and 16, Rose did not list or provide prices for any of the 26 and 25 respective subdivisions, but instead provided only one comprehensive price for each division; for Division 15 on the worksheet, all that appears is the price \$1,170,000 with the name of the subcontractor, Favino, above it. (In submitting its claim, however, Rose inserted the asterisked entry "Fire Protection System," labeled as "item missed," along with the notation of the amount, \$625,000, and the name of the allegedly omitted subcontractor, S&S Fire Suppression.)

We do not agree with the Army that Rose's evidence warrants correction of the bid. Essentially, Rose has presented only a memorandum, prepared by Rose itself, of the cost of unidentified fire protection work quoted by telephone to show that this item should have been included in the bid price. The memorandum does not refer to any particular section of the specifications, does not refer to "fire protection," and does not have a time noted so as to ascertain whether it was received before bid opening. In this connection, we note that other quotations specified the time received and at least one quote was received after bid opening. Also, there is nothing on record from S&S to confirm what its quote was for or when it was submitted.

We also find nothing in Rose's worksheets or adding machine tape to corroborate the firm's claim. The worksheets, as stated above, include only a single entry for Division 15, and there simply is no way to know from them whether Rose meant to but forgot to add to the total a price for fire protection, or whether the Division 15 quote already includes such a price. In this respect, the meaning of the notation on the Favino memorandum is not at all clear to us regarding

what the quotation includes; in any event, we note that, as with the S&S memorandum, the quoted price and notation were entered by Rose itself. Similarly, the adding machine tape establishes only that a figure of \$625,000 was not part of Rose's total bid; it does not show that the figure ever was intended to be part of the bid.

Moreover, even if the Division 15 Favino quote does not include fire protection, we cannot conclude from this record that Rose did not intentionally omit the item in an effort to be more competitive. The worksheet and adding machine totals are \$8,973,336, although Rose bid \$8,910,000 (which is the price Rose has asked be corrected upward), a reduction of \$63,336 that Rose claims it made at the last moment for bidding purposes, to be more competitive. Also, Rose omitted from its total bid price \$300,000 for overhead and \$300,000 for profit, both of which are reflected on Rose's worksheets but omitted in the adding machine total and the actual bid total on the worksheets, in another alleged effort to be more competitive. Thus, Rose's worksheets establish a pattern of reducing prices and deleting seemingly important contract elements, all to attempt to lower its total price as much as possible. In this circumstance, we could not conclude that Rose did not view the cost of fire protection as just another cost to exclude in order to bid low.

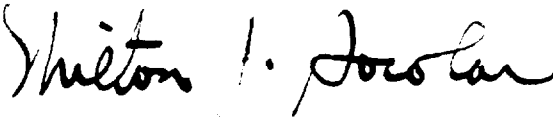
Therefore, we do not agree with the Army that Rose had proven its intended bid with clear and convincing evidence, as required by FAR, 48 C.F.R. § 14.406-3(a), since there is no substantive evidence in the record to corroborate the fact that Rose intended to but mistakenly did not include \$625,000 in its bid price. Western Alaska Contractors, B-220067, Jan. 22, 1986, 86-1 C.P.D. ¶ 66.

In contrast with the clear and convincing evidence required for bid correction, bid withdrawal requires a lesser degree of proof. In view of the longstanding general rule that acceptance of a bid with knowledge of an error does not consummate a valid and binding contract, see 36 Comp. Gen. 441 (1956), we have held that the government cannot bind a bidder after the bidder claims error without virtually proving that there was no error or that the claim was made in bad faith. See Murphy Brothers, Inc.--Reconsideration, 58 Comp. Gen. 185 (1978), 78-2 C.P.D. ¶ 440. Withdrawal of a

bid therefore may be permitted where it reasonably appears that an error was made. FAR, 48 C.F.R. § 14.406-3(c); Montgomery Construction Co., Inc., B-221317, Feb. 28, 1986, 86-1 C.P.D. ¶ 210.

We have no objection to permitting Rose to withdraw its bid. This conclusion is based on the disparity in bid prices received, Rose's assertion that it made a mistake, and the Army's evident view that the record at least reasonably supports the firm's claim. See Praught Construction Corp., B-222420, June 2, 1986, 86-1 C.P.D. ¶ 508. Accordingly, by separate letter to the Secretary of the Army we are recommending that the Army permit Rose to withdraw its bid, and award a contract to Dick, the next low bidder, if otherwise appropriate.

The protest is sustained.

for 
Comptroller General
of the United States